



STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION  
OFFICE OF FAIR HEARINGS

FILED

Aug 01, 2023, 3:18 pm  
OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH0975

vs.

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on June 29, 2023, at 1:00 p.m. Eastern Standard Time (“EST”).

**APPEARANCES**

For the Petitioner:

[REDACTED]

Petitioner’s Authorized Representative

For the Respondent:

Doris Rivera  
Medical/Health Care Program Analyst  
Agency for Health Care Administration

**STATEMENT OF ISSUE**

The issue is whether Respondent proved by a preponderance of the evidence that Respondent’s decision to reduce Petitioner’s Behavior Analysis (“BA” or “ABA”) services was correct.

**PRELIMINARY STATEMENT**

All parties and witnesses appeared telephonically. Petitioner’s Authorized Representative and [REDACTED] (“[REDACTED]”) appeared on behalf of Petitioner. The following attended as

witnesses for Petitioner: Jamie Powell (“Ms. Powell”), Supervising Behavior Analyst, and [REDACTED] [REDACTED] (“[REDACTED]”), Petitioner’s [REDACTED]

Doris Rivera, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent. Dr. David Bicard, (“Dr. Bicard”), Director of Clinical Operations for eQHealth Solutions Inc. (“eQHealth”), appeared as a witness for Respondent.

Petitioner did not introduce any exhibits at the fair hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and fifty (250) page evidence packet and a forty-nine (49) page evidence packet. The two hundred and fifty (250) page packet appears in the Office of Fair Hearings’ document management system as the file title “[REDACTED] FH 06.29.2023 1-141.pdf” and “[REDACTED] FH 06.29.2023 142-250.pdf”. The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings’ document management system as the file title “23-FH0975-Agency Evidence BA 49pgs.pdf”. Absent an objection from the Petitioner, the undersigned admitted two hundred and fifty (250)-page evidence packet into evidence as Respondent’s Composite Exhibit 1 (“RCE 1”) and the forty-nine (49)-page evidence packet into evidence as Respondent’s Composite Exhibit 2 (“RCE 2”).

### **FINDINGS OF FACT**

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth is a Quality Improvement Organization contracted by the Agency to review prior authorization requests for services. *See* page 2 of RCE 2.
2. Petitioner is [REDACTED] ([REDACTED] old. *See* page 16 of RCE 1. Petitioner is diagnosed with the following: [REDACTED]. *Id.*

3. In a request for additional information dated March 6, 2023, addressed to behavior analyst Jamie Powell, Ms. Powell was asked to submit an updated behavior plan signed and dated by the parent caregiver and author of the plan with the following information:

Updated plan with detailed parent/ caregiver training implementation strategies with accompanying goals. Updated graphs of intervention integrity measures for parent/ caregiver training.

See RCE1 at 47.

4. In a Request for Additional Information dated March 15, 2023, to Jamie Powell, Petitioner's behavior analyst, eQHealth requested the following:

Provider, please submit any new revisions such as procedures/interventions or replacement/acquisition skills that may assist in the reduction of the maladaptive behaviors or increase of the replacement skills based on the function of the behaviors. Additionally, any new caregiver goals that may also be of assistance for the treatment needs of the recipient. Please clarify and/or revise.

See RCE 1 at 46.

5. Petitioner requested continuation of BA services, specifically: 1664 units of code 97153, 416 units of code 97155 and 1040 units of code 97156. In a Notice of Outcome ("NOO"), dated March 24, 2023, Respondent terminated Petitioner's ABA services. The NOO explained the basis for the termination as follows:

[T]he requested services are not medically necessary under the following standard(s):

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs.

The NOO further provided:

PR Principal Reason Denial:

Submitted information does not support the medical necessity for requested frequency and/or duration.

PR Clinical Rationale – Denial: according to the Florida Medicaid State Plan (Appendix 9.3.b), the data provided must show evidence that the frequency of the maladaptive behavior(s) has decreased since the last review and, if not, that there is a modification of the behavior plan. The recommendations for procedural modifications include additions changes to treatment plan to impact behaviors targeted for reduction. Procedural modifications should include one or more of the following: antecedent manipulation modifications, modifications of prompting procedures used in acquisition, modifications in consequence- based strategies ones that either reduce maladaptive behavior or reinforce replacement behavior(e.g. Manipulation of reinforcement schedules, switch to a different declarative procedure) and or if lack of progress was due to therapist error (e.g. Poor data collection or poor training on intervention methods), how you will address human error. The provider has not addressed the lack of progress during the last observation and did not amend the treatment plan in relation to the lack of progress. The provider was requested to submit additional information on treatment modifications to determine the medical necessity of this request and the provider has either failed to submit this information or the information submitted does not meet the standards of care within the field of behavior analysis where the information is submitted is insufficient to address the lack of progress. The request is denied.

...

Pages 22-23 of RCE 1.

6. The revised treatment plan at RCE 1 pages 48-250 submitted by the provider identifies three goals for code 97156 (parental training): [REDACTED]

[REDACTED] . *Id.* at 136.

7. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated May 2, 2023, Respondent reversed their decision regarding codes 97155 and 97153 and modified its decision regarding code 97156. The units

added at reconsideration were: 416 units of code 97155, 312 units of code 97156 and 1664 units of code 97153. *Id.* at 34-35. The NRD explained the basis for the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The provider submitted new documentation that supports the medical necessity of this request. According to the Behavior Analysis Services Coverage Policy, (page 6,9.0 c-d), the recipient of ABA therapy services must engage in maladaptive behavior that interferes with the recipients daily functioning. Although the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive do not support the request for services. The current request is in excess of medical medically necessary BA services but BA services are approved at a lower level than requested. 149932, Ph.D, BCBA- D, LBA 3.2 9.

...

Pages 34-35 of RCE 1.

8. On May 1, 2023, Petitioner requested a Fair Hearing to challenge the reduction of ABA services. On May 24, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for June 29, 2023, at 1 :00 p.m. EST. Petitioner received administrative approval, or continuation of benefits, pending the outcome of the Fair Hearing. *Id.* at 18.

9. Dr. Bicard is a Board-Certified Behavior Analyst at the doctoral level. Dr. Bicard testified to the following:

- a. In order for any service to be authorized it must meet all 5 criteria of medical necessity.
- b. Here, services were denied in total at level one review with a partial overturn at reconsideration.

- c. The reduction in code 97156 for family training was deemed to be in excess of medical necessity. Originally, 10 hours of family training was authorized and this was reduced to three hours.
- d. As seen on pages 135-136 of RCE1, three parent goals were submitted by provider at time of reconsideration: [REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]
- e. In the provider treatment plan, criteria for mastery is based on child not parent. This is inappropriate as it is training for the Parent. Criteria should be based upon whether the parent can implement the protocol.
- f. 10 hours of parental training per week to complete these goals is excessive. The three hours provided are sufficient; these goals have been in place for the last [REDACTED]
- g. Authorization of hours based upon what was in the treatment plan.
- h. Dr. Bicard cannot make recommendations for treatment in a case where he is not lead analyst.
- i. After the ruling from the fair hearing, a request for modification can be sent to eQHealth by the lead analyst for recipient with specific goals and service being requested.

10. Jamie Powell, Behavior Analyst for Recipient, testified to the following:

- a. Additional documentation for barriers to treatment were added to treatment plan before reconsideration such as [REDACTED] [REDACTED] the family moving and [REDACTED] and [REDACTED] [REDACTED]
- b. Ms. Powell was not aware that she needed to submit additional goals and did not want to add too many to overwhelm the [REDACTED]
- c. Ms. Powell attended the peer review to discuss this case but was not given any recommendations for what to include in her treatment plan.

### CONCLUSIONS OF LAW

11. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to section 409.285(2), Florida Statutes (2019). This order is the final administrative decision of AHCA under section 409.285(2)(a).

12. This hearing was held as a *de novo* proceeding pursuant to Fla. Admin. Code R. 59G-1.100(17)(b).

13. Because Respondent reduced/terminated a previously approved service, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to the Respondent. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" (Black's Law Dictionary at 1201, 7th Ed.)

14. The Florida Medicaid Behavior Analysis Services Coverage Policy (October 2017) ("BA Policy"), incorporated by reference in Fla. Admin. Code. R. 59G-4.125, governs BA services available under Florida Medicaid. The BA Policy provides as follows:

#### **1.0 Introduction**

Behavior analysis (BA) services are highly structured interventions, strategies, and approaches provided to decrease maladaptive behaviors and increase or reinforce appropriate behaviors.

...

#### **1.4.5 Medically Necessary/Medical Necessity**

As defined in Rule 59G-1.010, F.A.C.

...

### **4.0 Coverage Information**

#### **4.1 General Criteria**

Florida Medicaid covers services that meet all of the following:

- Are determined medically necessary
- Do not duplicate another service
- Meet the criteria as specified in this policy

#### **4.2 Specific Criteria**

Florida Medicaid covers the following BA services in accordance with the applicable Florida Medicaid fee schedule(s), or as specified in this policy:

##### **4.2.1 Behavior Assessment**

One per fiscal year, per recipient, when completed within 30 days of the start of the assessment.

##### **4.2.2 Behavior Analysis**

Up to 40 hours per week, per recipient, consisting of services identified on the recipient's behavior plan in order to reduce maladaptive behaviors and to restore the recipient to his or her best functional level. Services include:

- Implementing behavior analysis interventions, and monitoring and assessing the recipient's progress towards goals in the behavior plan
- Behavior analysis interventions, for example, discrete trial teaching, task analysis training, differential reinforcement, non-contingent reinforcement, conducting task analyses of complex responses, and teaching using chaining, prompting, fading, shaping, response cost, and extinction
- Training the recipient's family, caregiver(s), and other involved persons on the implementation of the behavior plan and intervention strategies (the recipient must be present when clinically appropriate)

...

#### **4.3 Early and Periodic Screening, Diagnosis, and Treatment**

As required by federal law, Florida Medicaid provides services to eligible recipients under the age of 21 years, if such services are medically necessary to correct or ameliorate a defect, a condition, or a physical or mental illness. Included are diagnostic services, treatment, equipment, supplies, and other measures described in sectioned 1905(a) of the Social Security Act, codified in Title 42 of the United States Code 1396d(a). As such, services for recipients under the age of 21 years exceeding the coverage described within this policy or the associated fee schedule may be approved, if medically necessary. For more information, please refer to Florida Medicaid's General Policies on authorization requirements.

15. Appendix 9.0 of the BA Policy provides Review Criteria for Behavior Analysis Services.

These Review Criteria state as follows:

**Review Criteria for Behavior Analysis Services**

Behavior analysis (BA) services are considered as either the treatment of choice or as an adjunct treatment modality for a variety of conditions and disorders where maladaptive behaviors are part of the recipient’s clinical presentation, including behavioral manifestations of diagnoses such as Autism Spectrum Disorder and other behavioral health conditions.

**Critical Elements Necessary for ANY Type of Behavior Analysis Service:**

The following critical elements **MUST** be satisfied to qualify for BA services:

- a. Eligibility – The recipient must meet all criteria for BA services as outlined in the Behavior Analysis Services Coverage Policy, Rule 59G-4.125, F.A.C.
- b. Medical necessity – The recipient must meet medical necessity criteria as outlined in Rule 59G-1.010, F.A.C.
- c. The recipient currently engages in maladaptive behaviors
- d. These maladaptive behaviors interfere with the recipient’s daily functioning

**1. Criteria for Initial Behavior Analysis Assessment - BOTH** of the following **MUST** be satisfied:

- a. **ALL** critical elements are met
- b. Provide submits a valid written physician’s order as stipulated in the Behavior Analysis Services Coverage Policy, Rule 59G-4.125, F.A.C.

**2. Criteria for Behavior Analysis Services and Reassessments – ALL** of the following **MUST** be satisfied:

- a. **ALL** critical elements are met
- b. An assessment or, if applicable, a reassessment, authored by a lead analyst, is provided. An assessment of the maladaptive behavior(s) is a necessary element of the process of identifying the frequency and magnitude of the behaviors as well as the variables associated with the occurrence of the maladaptive behavior(s). This helps in defining what are the functional consequences of the problem behavior(s) so that an adequate behavior plan can be implemented. This (re)assessment **MUST** include, at a minimum, **ALL** of the following:
  - i. A clear operational description of the maladaptive behavior(s)
  - ...
- c. A behavior plan authored or updated by a lead analyst. The behavior plan is the cornerstone of the delivery of behavior analysis services and

it is based on the information obtained in the assessment. It proposes specific interventions to reduce or eliminate the maladaptive behavior. These interventions take into consideration the variables, both present before the behavior, as well as after the behavior, that influence the occurrence of the maladaptive behavior(s). This plan also includes replacement appropriate behaviors for the recipient to engage in instead of the maladaptive behaviors in order to obtain the same function. The plan must be detailed enough to warrant the requested services and include mechanisms to monitor its effectiveness. This **MUST** include, at a minimum, **ALL** of the following:

- i. Observable and measurable descriptions of the maladaptive behavior(s)
- ii. Identified function of the maladaptive behavior(s) behavior as a result of the assessment or reassessment conducted
- iii. Goals and strategies for changing the maladaptive behavior(s)
- iv. Written detailed description of when, where, and how often these goals will be addressed and proposed strategies will be implemented
- v. System for monitoring and evaluating the effectiveness of the plan
- vi. Safety and crisis plan, if applicable
- vii. Summary and recommendations
- viii. Discharge criteria
- ix. Transition plan (if applicable)

NOTE: Although the assessment and behavior plan were addressed separately in section 2, both of them can be submitted as a single document.

**3. Criteria for Continuation of Treatment at the Present Level and/or Using Current Methods:** Providers must ensure that ALL of the following criteria are met to request continuation of treatments at the present level or using the current methods. If criteria for 3a is met, but criteria for 3b and/or 3c are not met, then a reduction of the treatment level and/or change of treatment methods may be warranted.

- a. ALL criteria listed in 2a, 2b, and 2c regarding critical elements, assessment or reassessment, and behavior plan, are met.
- b. The data provided must show evidence that the frequency of the maladaptive behavior(s) has decreased since the last review and, if not, that there is a modification of the behavior plan.
- c. The level of functional impairment justifies continuation of BA services. The reviewer utilizes the information provided below as a guide as it relates to the level of functional impairment as expressed through the following behaviors:
  - i. Safety – aggression, self-injury, property destruction, elopement

- ii. Communication – problems with expressive/receptive language, poor understanding or use of non-verbal communications, stereotyped, repetitive language
- iii. Self-stimulating, abnormal, inflexible, or intense preoccupations
- iv. Self-care – difficulty recognizing risks or danger, grooming, eating, or toileting
- v. Other – behaviors not identified above

16. States must provide Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) services to Medicaid-eligible children under age 21 when requested under the Medicaid state plan. *See* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4). According to 42 U.S.C. § 1396d(r)(5), EPSDT services mean, in relevant part, the following items and services:

Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illness and conditions discovered by the screen services, whether or not such services are covered under the state plan.

17. Petitioner is under age 21, and therefore EPSDT applies to ■■■ request for services. However, a state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

The [Agency] shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

18. The Definitions Policy, incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines “Medically Necessary” or “Medical Necessity” as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider

The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

19. The Florida Medicaid Authorization Requirements Policy (“Authorization Policy”), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides as follows:

**3.2.1 Continued Authorization Requests**

The QIO shall not deny or reduce the amount, frequency, or duration of a service that is already being provided, unless:

- The reduction is to correct for factual error or omissions in prior certifications.
- There is a documented improvement in the recipient’s medical condition.
- There is a documented change in the recipient’s circumstances.
- The reviewing physician determines the recipient will not gain any additional benefit by continuing services at the current level.

20. In an NRD dated May 2, 2023, eQ revised their previous termination of BA services. See

¶ 7. The new authorization approved all codes at the requested rate however, reduced the requested rate for 97156, parental training. *Id.*

21. The rationale of the number of hours reduced from the previous authorization was due to the inclusion of only 3 goals for 10 hours weekly training. See ¶ 9.

22. Upon reconsideration, eQ deemed the hours requested for parental training to be excessive in relation to the number of goals. See ¶ 9. Three hours were approved for this authorization. See ¶ 7.

23. Further the eQ Health disputed the clinical determination of mastery of the goals to be measured by Recipient's behavior not the parents who are receiving the training. See ¶ 9.

24. Here, the reduction in hours authorized for parental training is based upon the treatment plan submitted which outlines the goals for the parental training. eQ Health provided significant and logical evidence for their rationale in reducing the number of authorized hours.

25. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Respondent proved by a preponderance of the evidence that the reduction of ABA services was necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has demonstrated that the previously authorized services, based on the treatment plan at issue in this case, are not necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Respondent proved by a preponderance of the evidence that Respondent's reduction of ABA services was correct.

**IT IS HEREBY ORDERED AND ADJUDGED THAT:**

Respondent's reduction of ABA services is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction is **DENIED**.

**DONE** and **ORDERED** this 1st day of August, 2023, in Tallahassee, Leon County, Florida.



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**LYNNE RINGERS, Hearing Officer**

Agency for Health Care Administration  
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**NOTICE OF A RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

**Copies Furnished To:**



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